

July 12, 2006

Civil Division-Kent County (739-7641)

Mr. Jeff Bruette  
116 Sleepy Hollow Drive, Suite C  
Middletown, DE 19709

**Re: Freedom of Information Act Complaint  
Against Town of Middletown**

Dear Mr. Bruette:

Our Office received your complaint dated May 31, 2006 under the Freedom of Information Act, 29 *Del. C.* Ch.100 ("FOIA"), alleging that the Town of Middletown ("the Town") violated the public records requirements of FOIA.

On May 15, 2006, you made two FOIA requests to the Town. The first request was for: " 1. A copy of any loan agreements between the Town of Middletown and Trinity Church between January 2004 and present. 2. Records of payments on the above loan(s) and the current status of any loan(s)." Your second FOIA request was for: "1. Copies of all agreements for loans extended by the Town between January 2004 through today to any individuals (employees or otherwise), businesses, groups, or organizations. 2. Current status of any of the loans identified above."

By letter dated May 25, 2006, the Town responded to your FOIA requests. As for the first

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request, the Town "advised that no loan agreements exist between the Town and Trinity Church." The Town denied your second request: "While there are loans to certain employees, we have been advised by our attorney that under 29 Del. C. 10002(g)(1) and (2), such documentation is not a public record."

By letter dated June 12, 2006, we asked the Town to respond to your complaint by June 23, 2006. We received the Town's response on June 23, 2006.

According to the Town, the loan program dates back to August 2003 when "a Town employee approached Mayor Branner in confidence and explained that he was in dire financial straits . . ." On advice of legal counsel, the Mayor declined the employee's request for a salary advance. Instead, the Town "created a loan agreement whereby the Town would loan the employee a certain sum of money so long as the money was repaid out of the employee's paycheck." The Town "considers these loans as part of its overall employee benefits package."

The Town provided us with a blank form agreement it uses for these employee loans. The form agreement provides:

I, authorize the Town of Middletown to deduct \$.00 per week from my paycheck until such time as the loan I received from the Town in the amount of \$.00 is paid in full.

In addition, I agree that should my employment with the Town of Middletown be terminated for any reason, the Town may apply any compensation owed to me to the balance due on the loan.

If said compensation is not enough to pay off the balance of the loan I further agree to make monthly payments to the Town of Middletown in the amount of \$.00 per month with the first payment being due 15 days after employment is terminated.

The form has signature/date lines for the borrower, a witness, and the approving authority.

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According to the Town, it has made loans to 29 (out of 103) employees totaling \$265,700, of which \$216, 841 is outstanding. The Town represents that the "only documentation (other than payroll deductions) is the executed loan agreement" and that it has "no objection to providing executed copies of the loan agreements providing the employee's name is redacted."

### **RELEVANT STATUTES**

FOIA provides that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA exempts from the definition of a "public record" any "personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy." *Id.* §10002(g)(1).

FOIA exempts from the definition of a "public record" any "trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." *Id.* §10002(g)(2).

## **LEGAL AUTHORITY**

### **A. Trinity Church Loan**

According to the Town, "[t]here was, in fact, a request by Trinity Church for a loan. Mayor Ken Branner mentioned this in the Executive Session on June 7, 2004 and that a proposed loan document would be prepared. However, the Town never took any action on this matter. Consequently, . . . there is not, nor has there ever [*sic*], a loan agreement executed between the Town and Trinity Church."

"It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Att'y Gen. Op.* 05-IB19 (Aug. 19, 2005) (quoting *Att'y Gen. Op.* 97-IB01 (Jan. 14, 1997)). We determine that the Town did not violate the public records requirements of FOIA by denying you access to a record (the Trinity loan agreement) which does not exist.

### **B. Employee Loans**

The Town contends that the names of the employees are exempt from disclosure under FOIA, either as part of the employee's personnel file or as confidential financial information.

#### **1. Personnel File**

In *Att'y Gen. Op.* 02-IB24 (Oct. 1, 2002), our Office adopted the Department of Labor's definition of a "personnel file" in 19 *Del. C.* §731(3), which includes "wage or salary information." FOIA, however, only exempts information in a public employee's personnel file "the disclosure of which would constitute an invasion of personal privacy." 29 *Del. C.* §10002(g)(1). Disclosure of a public employee's salary would not constitute an invasion of personal privacy.

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In *Gannett Co. v. Colonial School District*, Civ.A. No. 82M-DE-26, 1983 WL 473048 (Del. Super., Aug. 19, 1983) (Balick, J.), the Superior Court held that the salaries of public employees were public information under FOIA. "Although some might feel that the amount of their salary is personal, it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information." *Id. Accord Att'y Gen. Op.* 3W-023 (Mar. 10, 1978); *Att'y Gen. Op.* 3W-077 (Aug. 4, 1977).

In *Att'y Gen. Op.* 06-ID11 (May 31, 2006), our Office extended that reasoning to include time sheets and attendance records of public employees. "Just as the public has a right to know the salary paid to public employees, the public also has a right to know when their public employees are and are not performing their duties for which they are paid." *Id.* Your complaint requires us to take a further step to determine whether FOIA requires a public body to disclose an employee's non-salary compensation.

In *University System of Maryland v. Baltimore Sun Co.*, 847 A.2d 427 (Md. App. 2004), a newspaper requested information regarding incentives, bonuses, broadcast agreements, and athletic footwear contracts to ascertain the total compensation of the university's head football and basketball coaches. The university denied the request claiming the information was exempt under the Maryland Public Information Act ("MPIA") as a "personnel record." Md.Code §10-616(a)(i) ("a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information").

The MPIA requires disclosure of the "salary of an employee or a unit or instrumentality of State Government." *Id.* §10-611(g)(2). The Maryland Court of Appeals held that a public

employee's "salary" should be construed broadly to include "any document evidencing the employment arrangement and how the state-funded salary is earned . . . especially in light of the various alternatives for compensation potentially available to the coaches in the form of car allowances, country club memberships, complimentary ticket sales, use of state-owned resources for clinics and camps, etc." *Baltimore Sun*, 847 A.2d at 441.

The interest-free loans made by the Town to its employees are a form of compensation. "For income tax purposes, an employer making an interest free loan to an employee is deemed to have paid, as compensation to the employee, an amount equal to the annual interest the employee would have been required to pay had she borrowed the money from a commercial lender. This amount is known as 'imputed income.'" *Diamond v. T. Rowe Price Associates, Inc.*, 852 F. Supp. 372, 414 (D. Md. 1994). The Town acknowledges that it "considers these loans as part of its overall employee benefits package." <sup>1</sup>

We believe that the courts in Delaware would hold that disclosure of non-salary total compensation in whatever form to public employees would not constitute an invasion of privacy and therefore is not protected by FOIA's personnel file exemption. The public has a right to know how their public servants are compensated with taxpayer monies whatever the form the compensation might take. Public bodies should not be able to avoid revealing how their employees are paid by shifting the form of pay from fixed salary to bonuses, lump-sum payments, or other forms of

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<sup>1</sup> It is not clear from the record whether the Town reported the loans for tax purposes. *See Diamond*, 852 F. Supp. at 414 ("T.Rowe Price reported the imputed income on the Form 1099s that the firm provided to the Internal Revenue Service and to Diamond every year from 1989 to 1992. . . . Diamond attached the 1099 Forms to her income tax returns for the years 1989 to 1992 and reported the imputed income as 'nonemployee compensation.'").

compensation such as interest-free loans.<sup>2</sup>

The Town contends that "disclosure of the identity of the employee to whom the loan is granted would be highly offensive and is truly not of legitimate concern to the public." We are sensitive that disclosure of the names of the employees might create an embarrassing perception of financial distress. In balance, however,

[t]he public has a very strong interest in knowing to whom such public funds are being loaned and in what manner the loans are being repaid. Public disclosure and oversight will provide protection against malfeasance, misfeasance and the waste of public funds. Borrowers of public funds must expect public oversight, as contrasted with borrowers from private sources, and the benefits of such oversight outweigh their privacy interests.

*Parsons v. Urban Redevelopment Authority of Pittsburgh*, 893 A.2d 164, 169 (Pa. Cmwlth. 2006).

*Id.* at 167. Individuals do not "have a right to privacy or reputation in their loan histories sufficient to overcome the public's right to know." *Id.* at 169.

Public oversight of loans made by the Town using taxpayer monies requires disclosure of the names of the borrowers just as FOIA requires disclosure of the names of public employees together with their salaries. *See Colonial School District*, 1983 473048, at p.1 (school district must disclose "**specific** administrators' salaries" ) (emphasis added). "[T]here is no way to verify the accuracy of the information or to conduct any meaningful public oversight of governmental operations without

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<sup>2</sup> We note that Article VIII, Section 8 of the Delaware Constitution provides: "No county, city, town or other municipality shall lend its credit or appropriate money to, or assume the debt of, or become a shareholder or joint owner in or with any private corporation or any person or company whatsoever." The question of whether the interest-free loans to Town employees is unconstitutional or a valid expenditure for an employee benefit is not within the scope of FOIA.

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the employees' names, because it is otherwise impossible to detect patterns, overpayment, underpayment, irregularities, abuse, fraud, discrimination, favoritism or inefficient management of public employees." *City of Bakersfield v. The Bakersfield Californian*, 2002 WL 32122040, at p.4 (Cal. App., Dec. 4, 2002).

When employees avail themselves of an interest-free loan from the Town, they must expect that there will be public oversight of the amount and repayment of the loan requiring disclosure of the name of the borrower.<sup>3</sup> The public has a legitimate interest in knowing the essential facts about a financial transaction between an individual and a public body including the name of the borrower, the amount of the loan, the terms of re-payment, and the loan status. Loan status means more than just a statement as to whether the loan is current or delinquent. Loan status also includes the date last paid, next date due, the length of any delinquency, the number of payments made and the number of late payments.<sup>4</sup>

We determine that the Town violated FOIA by not providing you with access to employee loan information. That information is not exempt under FOIA as a personnel file because disclosure

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<sup>3</sup> Of course, there may be information provided by borrowers to the government which should not be disclosed, "particularly [in] the loan applications, [which] necessarily contain a great deal of information that is personal and confidential as to individuals." *Parsons*, 893 A.2d at 169 (redacting home addresses and telephone numbers, Social Security numbers, and bank account numbers). You did not request copies of any loan applications, and, according to the Town, there is no written application, only the executed loan agreement. We do not need to address this issue in more detail here, except to note that we do not believe FOIA would require the Town to disclose the nature of the financial hardship for the loan application.

<sup>4</sup> According to the Town, "all money that has been loaned has either been repaid in full or the employee is current in his/her repayment obligations" but the only documentation of the loan status is the loan agreement and payroll deductions. If so, then the Town will have to make publicly available the payroll deduction information in addition to the loan agreements so that a citizen can do an accounting.



would not constitute an invasion of personal privacy.

2. Confidential Financial Information

In *Att'y Gen. Op.* 87-IO31 (Nov. 4, 1987), our Office determined that personal financial statements filed by licensees with the Alcoholic Beverage Control Commission were confidential information. "The release of information regarding one's assets, profits and losses, stock holdings and collateral" are exempted from disclosure under FOIA. *Id.* See also *Att'y Gen. Op.* 96-IB30 (Sept. 25, 1996) (tax returns of parents of children applying for scholarships were not public records under FOIA).

The federal FOIA, like Delaware's, exempts "trade secrets and confidential or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4) ("Exemption 4"). The legislative history of Exemption 4 shows that Congress intended it to include "technical or financial data submitted by an applicant to a Government lending or loan guarantee agency." H.R.Rep. 1497, 89<sup>th</sup> Cong. 2d Sess 10, *reprinted in* [1966] U.S.Code Cong. & Admin. News 2418. <sup>5</sup>

In *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1973), a public interest group made a FOIA request for an investigative report about housing discrimination. The federal appeals court noted that "[t]he Senate Report on the bill which became

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<sup>5</sup> Exemption 4 does not go so far as to incorporate a blanket "lender-borrower" privilege. See *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 400 (5<sup>th</sup> Cir.), *cert. denied*, 471 U.S. 1137 (1985) (the "term 'privileges' refers only to privileges created by the Constitution, statute, or the common law. None of these sources recognizes a lender-borrower privilege.") (footnotes omitted)).

FOIA suggests that loan applications would be within the scope of exemption 4." 498 F.2d at 79 n.30 (citing S.Rep. 813, 89<sup>th</sup> Cong., 1<sup>st</sup> Sess 9 (1965)). "As much of the information collected here related to loan applications, certainly some data is financial information which might warrant confidential treatment." 498 F.2d at 79 (footnote omitted).

In *Miami Herald Publishing Co. v. Small Business Administration*, 670 F.2d 610 (5<sup>th</sup> Cir. 1982), a reporter made a FOIA request for a list of small business borrowers, the date and amount of their loans, the remaining balance, and records reflecting if a loan had been written off, liquidated, or declared delinquent. "Significantly, the information sought does not include information supplied in the process of applying for loans . . . Thus disclosure of such matters as the general financial condition or the personal background of the applicant is not at issue." 670 F.2d at 615. <sup>6</sup>

Like Delaware's FOIA, the federal FOIA only exempts confidential financial information "obtained from a person." In *Buffalo Evening News, Inc. v. Small Business Administration*, 666 F. Supp. 467 (N.D.N.Y. 1987), a newspaper made a FOIA request for information about loans for disaster relief: (1) the names of the borrowers; and (2) the amount of each loan and the dollar amount repaid to date. The federal district court held that the information "has been generated by the SBA regarding the individual loan amounts, including the outstanding balances and payment, collection,

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<sup>6</sup> In *Miami Publishing*, the SBA provided the names of the borrowers and the date and amount of their loans, but refused to provide loan status information claiming it was confidential financial information. The court rejected the SBA's argument that disclosure of loans classified as delinquent, in liquidation, or charged off would violate the personal privacy of the borrowers. There was no reasonable expectation of privacy because the "borrower's only realistic expectation is that the lender, whether the SBA on a direct loan or a financial institution on a guaranteed loan, will proceed against him with the full force of the law. So proceeding, the lender will publicly disclose precisely that data which the SBA here seeks to withhold." 670 F.2d at 615-16.

or discharge status" and was not "obtained from a person" for purposes of Exemption 4. 666 F. Supp. at 468 (citing *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 627 F.2d 392, 404 (D.C. Cir. 1980) ("the requirement that information be 'obtained from a person' [is] to restrict the exemption's application to data which have not been generated within the Government")). "In no way do these records implicate any financial information provided to the government by the borrower.'" *Buffalo Evening News* 666 F. Supp. at 468.

The Town's loan agreements with employees and the status of those loans is not confidential financial information provided by the borrower. The form loan agreement only identifies the borrower, the date and amount of the loan, and the terms of re-payment, and repayment is reflected in payroll deductions. All of this information "has been generated by the [Town] in the course of its involvement with its borrowers" and is not exempt under FOIA. *Buffalo Evening News*, 666 F. Supp. at 469.

The Town contends that if it "is forced to disclose employees' identities under FOIA, this will have a chilling effect on the loan program . . . The employees who availed themselves of this employment benefit have a reasonable expectation of privacy and might have made other choices if they understood that their identity would be subject to disclosure by virtue of a FOIA request."

We do not believe that public employees have a reasonable expectation of privacy that any part of their compensation package – including an interest-free loan – is confidential. Nor do we believe that there is any particular stigma attached to the need to apply for a loan considering that 29 (out of 103) Town employees have received loans. Whether any particular employee would have turned down an interest-free loan is speculative because many State and local government employees do not understand that their compensation in whatever form is public information.

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### **CONCLUSION**

For the foregoing reasons, we determine that the Town violated the public records requirements of FOIA by denying you access to copies of loan agreements between the Town and Town employees and information regarding the status of those loans. As remediation, we direct the Town to make available to you within ten days of the date of this letter any loan agreements or other records reflecting: (1) the names of the borrowers; (2) the amount of the loan; (3) the terms of repayment; and (4) the loan status. To the extent that there is any confidential financial information (such as a personal financial statement or tax return) or personal information the disclosure of which would invade personal privacy (*e.g.*, home address and telephone number, social security number, bank account numbers), the Town should redact that information from the records before making them available to you.

We direct the Town Solicitor to notify us in writing within ten days after the Town has completed remediation.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor

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cc: The Honorable Carl C. Danberg  
Attorney General

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